

Supreme Court, U.S.
FILED
MAY 18 2011
OFFICE OF THE CLERK

No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Respondent Railroad Friction Products Corporation ("RFPC") made pursuant to Supreme Court Rule 29.6 and set forth in RFPC's brief in opposition remains current, with no amendment necessary.

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On May 6, 2011, the federal government filed an amicus curiae brief in *John Crane, Inc., v. Atwell*, No. 10-272, which recommends that the Court: (1) grant the petition for a writ of certiorari filed by John Crane, Inc.; (2) hold the petitions in this case and *Griffin Wheel, Inc. v. Harris*, No. 10-520, pending *Atwell*'s disposition; and (3) affirm the decision of the Superior Court of Pennsylvania in *Atwell*.

With respect to the last point, the government concedes that the Pennsylvania superior court's decision in *Atwell* is "erroneous" in holding that various acts of Congress and precedents from this Court have narrowed the preemptive effect of the Locomotive Inspection Act ("LIA") on state law. U.S. Br. 10, 19-22. Nevertheless, the government recommends that the superior court's decision be affirmed on the alternate ground that the field preempted by the LIA does not encompass state-law tort claims based on exposure to asbestos during the repair of locomotive parts and equipment at railroad maintenance facilities, while the parts and equipment are not in use on a railroad line. U.S. Br. 11-18. RFPC submits this supplemental brief in response.

There are a number of glaring problems with the government's novel arguments concerning the preemptive effect of the LIA on state-law tort claims. The most fundamental of these is that there is no clear and irreconcilable conflict among the circuit courts and state courts of last resort on the question presented, even as re-framed by the government. Here, the government's arguments only serve to underscore why the question presented does not warrant this Court's attention at this time.

ARGUMENT

1. Because Of Congress's Broad Delegation Of Regulatory Power To The Secretary, The LIA Preempts All State Regulations Directed To The Design, Construction, And Material Of Railroad Equipment and Parts.

1 To begin with, the government's novel and convoluted view of the LIA's preemptive effect conflicts with this Court's reasoning and holding in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926).

a. In *Napier*, this Court considered the field occupied by the LIA and the LIA's preemptive effect on state laws "directed to ... the equipment of locomotives." 272 U.S. at 611-13. The Court held that: (1) through the LIA, Congress conferred on the Interstate Commerce Commission (and now to the Secretary of Transportation, and his delegate, the Federal Railroad Administration ("FRA")) the "general" power to regulate the safety of locomotive equipment; (2) the federal regulator's delegated power extended "to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances;" and (3) the "broad scope" of the LIA's delegation of power to the federal regulator led to the conclusion that the LIA was intended to occupy the entire field of regulation concerning locomotive equipment and preempt all state laws falling within the scope of the regulator's authority. *Id.*

The Court also noted that the broad delegation of these powers to the federal regulator meant that any state law "directed to the same subject—the

equipment of locomotives"—was preempted, regardless of whether the regulator actually had exercised its powers. *Id.*

b. The "field" occupied by the LIA, thus, is defined in terms of the federal regulator's broad power over "the design, the construction, and the material" of physical objects that may be put to use on a railroad line—*i.e.*, "every *part* of the locomotive and tender and of all appurtenances." *Id.* (emphasis added). The Secretary's broad regulatory power does not vary depending on the transitory condition or location of a particular part or piece of equipment—*i.e.*, on whether a particular part or piece of equipment happens to be "on" or "off" the line or "in" or "out" of use at any moment. Of necessity, the design, construction, and material of all parts and equipment are first fixed, *off-line*, in *advance* of parts and equipment being put to use on a railroad line, and the design, construction, and material of such parts and equipment remains the same, both on and off the line. Indeed, there is no dispute that the LIA grants the Secretary regulatory power over *many* conditions and activities that occur in advance of parts and equipment first being put to use on the line, including regulatory power over manufacturers, who design, construct, and sell parts and equipment, off-line, for subsequent use on the line. *See* 49 U.S.C. § 21302; 49 C.F.R. §§ 229.7(b), 229.21-229.33 (collectively requiring daily inspections and periodic testing of various parts and subjecting "manufacturer[s] ... of railroad equipment" to penalties).

c. The government appears to agree that: (1) the LIA provides the Secretary with the power to

regulate the design, construction, and material of railroad parts and equipment in advance of the use of such parts and equipment on a railroad line; (2) the design, construction, and material of such parts and equipment "remain the same" whether or not the parts or equipment happen to be in use at any given moment; (3) state-law tort claims based on exposure to asbestos-containing materials in parts and equipment are directed, in purpose and effect, at the same "subject" as the LIA—namely, the "design, construction, and material" of those parts and equipment; and (4) state-law tort claims based on such exposure to asbestos-containing materials in parts and equipment "conflict" with the LIA, even when the exposure allegedly occurs during the repair of parts and equipment at railroad maintenance facilities, while parts and equipment are not in use. U.S. Br. 15-17 (conceding that such state-law tort claims would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the LIA]") (first alteration in the original).

Nevertheless, the government inexplicably contends that state-law tort claims based on exposure to asbestos-containing materials during the repair of locomotive parts and equipment lie outside the LIA's regulatory "field," as described in *Napier*. This is a non-sequitur, pure and simple. Under *Napier*, if the LIA gives the Secretary the power to regulate asbestos-containing material in the design and construction of locomotive parts and equipment, before any part or piece of equipment actually is put to use on a railroad line (as the government concedes that the statute does), then the LIA also must be construed to preempt state tort laws directed to that

same subject—*i.e.*, asbestos-containing material in the design and construction of locomotive parts and equipment, before any part or piece of equipment is put in use on a railroad line.

And, the LIA must be construed to have this preemptive effect on state law, regardless of whether the Secretary has exercised his powers on this subject and promulgated specific regulations that squarely conflict with the "object" of the state-law claims. *Compare Napier*, 272 U.S. at 611-13 (holding that the LIA preempts state laws that are "directed to" the design, construction and material of "locomotive equipment," regardless of whether the federal regulator actually has exercised its powers) *with* U.S. Br. 16-18 (suggesting that the preemption of state-law claims may depend on whether the "legal theory" underlying the claim "actually" conflicts with the LIA and federal regulations thereunder); *see also Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999) ("[A]ny state law that attempts to regulate within the domain is preempted," and the "relevant question" for preemption under the LIA "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place.").

Under *Napier*, nothing more is, or should be, required to support the conclusion that the LIA preempts state-law tort claims based on exposure to asbestos-containing materials during the repair of locomotive parts and equipment at railroad maintenance facilities.

The same, plain reading of *Napier* also demonstrates that the government is just as wrong when it posits a possible distinction between the

LIA's preemptive effect on state-law tort claims based on exposure to asbestos and those based on a failure to warn about the design, construction, and material of parts and equipment containing asbestos. Under the LIA, the Secretary has the power to regulate not only the presence and use of asbestos-containing material in the design and construction of parts and equipment, but also the warnings that must be given along with such parts and equipment. Indeed, the Secretary often has exercised that power to direct warnings along with parts and equipment. *See, e.g.*, 49 C.F.R. §§ 210.27(d)(3) (labeling requirement for wayside noise levels), 215.9(a)(3) (warning posted on defective freight cars), 229.85 (warning notices for high voltage equipment), 229.113 (warning notices for steam generators), *cited in Law v. Gen. Motors Corp.*, 114 F.3d 908, 911 (9th Cir. 1997) (failure-to-warn claims within the regulatory field occupied by the LIA and delegated to the Secretary and his designee).

Moreover, as lower courts uniformly have recognized, if failure-to-warn claims are deemed to be outside the regulatory field of the LIA, "states could promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). This is precisely what *Napier* and its progeny say is the exclusive regulatory domain of the federal government and something a state cannot touch.

2. The application of *Napier* and the LIA to state-law tort claims "directed to" asbestos-containing material in the design and construction of railroad

parts and equipment is straightforward and logical, and not "artificial[]" in any respect. *See* U.S. Br. 16. That is why courts repeatedly have rejected the narrowing argument advanced by the government and held that the LIA's preemptive effect on state law does not depend on whether railroad parts and equipment are actually "in use" at the time of the alleged exposure to asbestos. *See, e.g.*, *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396 n 5 (3d Cir. 2010), *reprinted in* App. 6a-21a; *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402, 409-411 (Cal. Ct. App. 2007); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299, 302 (N.Y. Sup. Ct. 2000).

In fact, no court of appeals or state court of last resort *ever* has embraced the novel and convoluted theory of LIA field preemption that the government now advances. In its brief, the government grounds its theory primarily on cases decided under the Federal Employers' Liability Act ("FELA"), now codified at 45 U.S.C. §§ 51, et seq. U.S. Br. 12-13 (citing cases). FELA provides an injured railroad employee with a cause of action to recover compensatory damages from a railroad when the railroad's negligence plays any part in causing an injury. Neither the assumption of the risk nor the contributory negligence of the employee is a defense to a railroad's FELA liability. 45 U.S.C. §§ 53, 54. And an injured railroad employee can establish negligence per se under FELA by proving that a railroad allowed parts and equipment to be used on its line without being in a proper and safe condition in compliance with the LIA or another railroad safety statute. *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

In cases arising under this remedial regime, courts have held that a finding of negligence per se is permissible only when there are allegations and evidence that a part or piece of equipment was "in use" on the line when the injury occurred. U.S. Br. 12-13 (citing cases). That rule makes sense given the language of the relevant statutes defining the specific duty of care imposed on railroads under the LIA. *See* 49 U.S.C. § 20701(1).

But the preemptive effect of the LIA is a consequence not of the duty of care that the LIA imposes on railroad carriers, but the statute's broad delegation to the Secretary of exclusive power to regulate the design, construction, and material of parts and equipment. Moreover, as noted above, nothing in the LIA conditions the Secretary's regulatory power over design, construction, and material to those transitory periods when parts and equipment are actively being used on the line.

Simply put, *none* of the government's cited cases even implicates, much less undertakes to resolve, the scope of LIA field preemption under *Napier*. Accordingly, none provides evidence of a clear or irreconcilable conflict among the court of appeals or state courts of last resort over the scope of LIA field preemption or demonstrates any need for this Court's intervention.

II. There Is No Entrenched And Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented.

In its Brief in Opposition, RFPC urged the Court to deny the petitions pending in *Atwell*, *Harris*, and

this case (*Kurns*) because "there is no irreconcilable conflict among the federal courts of appeals or the state courts of last resort on the LIA's preemptive reach." RFPC Br. 5-13 (noting that since this Court's summary affirmance in *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983), no federal court of appeals or state court of last resort has called LIA's preemptive reach into question and that a solid phalanx of federal and state court decisions have applied *Napier* and its progeny uniformly).

The government's amicus brief proves RFPC's point: No matter how one frames the question presented, there is no conflict among the courts of appeals or the state courts of last resort concerning the LIA's preemptive effect on these state-law tort claims.

What is more, there is no dispute that the decision of the Third Circuit in this case provides a comprehensive and definitive declaration of the preemptive principles that will control federal courts in Pennsylvania—a declaration that likely will be influential in any subsequent analysis of the preemption issues undertaken by Pennsylvania's state courts or other federal or state courts.

This Court's consideration of the question presented, accordingly, should wait until other circuit courts and state courts of last resort, including in Pennsylvania, have had an opportunity to consider the Third Circuit's dispositive opinion in this case, as well as the novel arguments now advanced by the government. If a real conflict arises and ripens among the circuit courts and state courts of last

resort concerning the question presented, the Court can intervene to resolve that conflict in a future case that presents the question of the LIA's preemptive effect in a clearer and cleaner factual and legal context. *See* RFPC Br. 12-13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

May 18, 2011

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